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Supreme Court of the United States.

JOSEPH RALPH BURTON,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

NUMBER 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief for Plaintiff in Error in Reply to Supplemental and Reply Brief for the United States.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief for Plaintiff in Error in Reply to Supplemental and Reply Brief for the United States.

This brief on behalf of Senator Burton is purely in reply to the supplemental reply brief of the United States filed since the argument. This brief of ours is in no sense a substitute for *our main brief* and *our supplemental brief* already filed, to which we beg the Court's careful attention, but is merely to correct certain errors into which the learned Solicitor-General has fallen and in reply to some of the new suggestions which he has made.

I.

The first point made by the United States in its supplemental and reply brief is that *the offense charged in the indictment is a "misdemeanor," and not a felony*, and that therefore the defendant, under Section 819 of the Revised Statutes, was entitled to only three peremptory challenges. It is admitted that if it be a *felony*, the defendant was entitled, as he claimed on the trial, to ten peremptory challenges, and it would be error to deny, as the Court did, ten peremptory challenges. On the other hand, if the offense charged is a *misdemeanor*, as insisted in the Government's supplemental and reply brief, then the case is within the privilege of the defendant as a Senator, as provided in Article I, Section 6, of the Constitution of the United States, and as shown under POINT V. of our main brief, page 182 *et seq.* That privilege extends to "*all* cases except treason, felony and breach of the peace." The charge against Senator Burton is neither treason, felony nor breach of the peace, and, therefore, the privilege exists.

In the Government's supplemental brief (pp. 41, 42), in relation to the jurisdiction of this Court the learned Solicitor-General says:

> "I may have gone too far in stating in my original brief that there was not a shred of reason for contending that a constitutional question was presented justifying a direct appeal under Section 5 of the Judiciary Act of 1891. It may be that I gave too little attention in that connection to the question of privilege, but I repeat that it was waived," etc.

The supposed waiver is also the subject matter of POINT VII. of the Government's supplemental and re-

ply brief (p. 49), in which it is insisted that the privilege is personal. The reasons why it is not personal, but belongs to the office of Senator, was not waived and is not the subject of waiver, are so fully set forth, together with the authorities, historical and judicial, supporting it, in our main brief (POINT V., p. 182 *et seq.*), that we do not refer to if further in this connection, but refer the Court to our main brief.

II.

The second point in the supplemental and reply brief of the learned Solicitor-General (pp. 11–31) contains nothing new in relation to the facts of this case as they were brought out in the oral argument. He does not dispute the completeness or the correctness of the statement of facts, as carefully given under POINT II. of our main brief, extending from pages 52 to 120, wherein we show the subject matter of each of the five visits of the defendant to the Post Office Department, and quote from the record by page *all* the testimony bearing on those five visits.

The following facts are there shown conclusively and indisputably:

(a) None of the five visits made by Senator Burton to the Post Office Department had the slightest reference to any fraud-order inquiry, but related wholly to other and distinct matters.

(b) We ask particular attention to pages 84, 85, 86 and 87 of our main brief, wherein by reference to the

record, page by page, we show that during the time of Burton's employment by the Rialto Company he *did not even know* that any fraud-order inquiry was before the Department or pending therein. Moreover, we show that the alleged services in all of the five visits related to something distinctly other than the issue of a fraud order.

(c) In point of fact, during Burton's employment between November 18, 1902, and March 26, 1903, when the employment ceased, there was " no case " against the Rialto Company pending before the Post-office Department, and certainly none that Burton knew of. The pages of the Record showing this are carefully collated in our main brief at pages 87–95, and make this fact indisputable.

In the Government's supplemental and reply brief, under POINT II, the Solicitor General states with reference to the conference between Harlan and Burton on the train respecting Burton's employment (p. 13), that " it is inconceivable that Harlan did not mention the complaints and inquiry which he knew were pending." Harlan did not know that any such inquiry was pending, because the Hout and Evans complaints had been reported against. (Dice's Evidence, Record page 70 ; Price's Evidence, Record page 202). And the learned Solicitor General in discussing this point wholly omits to refer to the positive testimony of Senator Burton, found in the Record at page 218, as follows :

" Q. At the time of the interview between Mr. Harlan and yourself, in which the details of your employment were arranged, was there any indication given to you that there had been any complaint made against

the Rialto Grain and Securities Company? A. No sir, Mr. Harlan said to me that there was absolutely nothing against the company, and he said, 'if you do not believe it, go and inquire yourself.'

"Q. So is it a fact that it was on this occasion that you first learned that there was any such thing as a complaint against the company? A. Yes, sir."

The Solicitor General also omits to refer to Senator Burton's testimony that after he had received the letter from Harlan of November 22, stating that the complaints had been investigated by the Post-office Inspector and he had made a report in favor of the company relative to the same, Senator Burton "never gave the matter of such complaints another thought" (Record, p. 220).

This fact, fully established by uncontradicted evidence, is a complete solvent of all the suspicions sought to be engendered—this fact, namely, that the visits of Senator Burton to the Department were made when he supposed and believed that there was no fraud order inquiry pending, and that each of those visits was occasioned by some other matter which arose independent of any fraud order inquiry.

(d) The supplemental and reply brief of the Government ingeniously avoids any reference to the testimony of Senator Burton and of Mr. Cochran (the Government's only witness to sustain the charge in the indictment), that at the very first interview on November 20th (which the Solicitor General discusses at such great length) Senator Burton distinctly informed Mr. Cochran, as Mr. Cochran admits, he [Burton] "would not undertake to appear in the Department as against the United States" (Record, page 147).

On this important point Senator BURTON testified as follows (Record, page 218):

"Q. Was the interview between yourself and Mr. Cochran limited to this, or did anything further take place, as you recall? A. I had previously told Mr. Cochran, as I stated, that, if Maj. Dennis was indicted in the other matter, that I expected to help defend him, and then I said to him: 'Now, Cochran, I am the counsel for the Rialto Grain and Securities Company. Major Dennis owns the company. He is a stranger to me. I have been assured that the company is organized and its methods are all right. But I do not know, and if anything comes into the department that puts you upon inquiry, any complaints or anything of the kind, I wish you would advise me, because, notwithstanding I am counsel for the company, I am not its counsel here. I cannot be retained under any circumstances to appear in the department as a paid attorney.'

"Q. Now, Senator, at that time did you— A. But there is one more expression I omitted there. I said 'Another thing, Mr. Cochran; in case that it should become necessary to recommend summary action on any complaint, disregard my request entirely; because I won't answer any of these complaints, and I won't remain attorney of the company or counsel for the company, if it has any trouble with the department.'"

COCHRAN, though present at the trial, was not recalled to rebut or controvert any of these detailed statements of Senator Burton. On the contrary, Cochran confirms them, as will be seen by his testimony on page 147. COCHRAN thus testifies:

"Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter.

"Q. At any of these interviews between Senator Burton and yourself prior to the indictment, did he indicate to you that he would not undertake to appear in the department as against the United States? A. He did.

"Q. Are you able to recall on which occasion that occurred? A. Why, I cannot with any certainty. The Senator told me that several times.

"Q. Disclaimed, whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States? A. I think he did, yes, sir.

"Q. Do you recall his having indicated that so far from desiring to appear as against the United States, if any occasion arose when summary action was necessary that he did not even ask to be notified with reference to it? A. No, sir, I cannot quite recall that. He did say, however, that he would not antagonize the department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the department were wrong, even then he would not oppose them."

On this important point therefore, viz., that Cochran was from the first informed by Senator Burton that he would not act for the Rialto Company as its counsel if any complaints were made, both Cochran and Burton agree.

It is a false and unsound assumption which pervades the entire brief of the Solicitor-General, that *inquiries* made by the defendant at the Department as to whether complaints have been filed, etc., etc., even when accompanied with the statement that if any trouble arose between his client and the Department he (the defendant) would not appear or act for his client, and, further, that in such event he would not remain the counsel for the company,—we say it is a false and unsound assumption that such inquiries constitute a prohibited service. There is no such prohibition in Section 1782. The prohibition is against rendering *services* in a matter before the Department in which the United States has an interest, not against making *inquiries* as to whether there is a matter before the Department, and this statute, it must be borne in

mind, is a criminal statute and must be strictly construed.

We wish to affirm it as our deliberate opinion and judgment that Senator Burton, in any of the visits which he made to the Post-office Department, made no inquiries which, as the general counsel of the company, he might not legally and properly make, and that in making such inquiries he rendered "no services" whatever within the prohibition of Section 1782, and at all events he did not thereby render any services "with the view and for the purpose" of preventing the issue of a "fraud order"—the sole and only charge in the indictment, and the sole and only matter material under this indictment.

So that we have the following undisputable facts:

(a) The contract excluded any prohibited services.

(b) Burton did not know of any pending fraud order inquiry, if any was pending.

(c) The five visits show no services having any relation to any fraud order inquiry; each and all of the said visits relate distinctly to something else, namely, the Dennis indictment, the bogus inspectors Bowman and Shove, the McGowan matter before the Indian Department, the return of the books of the Brooks Brokerage Company, &c.

(d) This is conclusive and ought to have ended the case below, namely, that with all the zeal of the Post Office officials and the prosecuting officers in this case, Cochran is compelled to admit on his cross-examination, as follows (Record, pages 146, 147):

"Q. At any time from the beginning of Senator Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him [Burton], was there, as to the issuance or non-issuance of a fraud order as it is called against the Company. A. I think not.

* * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * *

"Q. There was no discussion between you, was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

What a preposterous and unjust charge is here being urged against Senator Burton, indicted specifically and only for trying to prevent a fraud order by his visits to Cochran, when in all of them from the beginning to the end the question of a fraud order was never discussed nor was it the subject of any representation or of any conversation between Burton and Cochran.

The Government's supplemental and reply brief refers to Harlan's *unanswered* letter of December 2d (Record, page 135); also to Harlan's letter of December 3d and Burton's reply thereto; and to the telegrams in relation to turning over the books of the Brooks Brokerage Company in relation to McGowan, the

Indian agent. These letters and telegrams we have fully and carefully discussed in our main brief, pages 95 to 114, to which we refer the Court.

We there show (pp. 95, 96):

> "1. That they had no reference whatever to any fraud order inquiry.
>
> "2. They related wholly to matters distinct from and having no reference to any fraud order, and these matters were not within the prohibition of Section 1782, were entirely proper, and were such as in no possible construction of Section 1782 was the United States 'interested therein, directly or indirectly.'
>
> "3. They contain no admission of the rendering of any prohibited services or of any offense whatever, and were mostly, if not altogether, irrelevant and incompetent—of no evidenciary value against Burton, but properly read and understood are evidence in his favor in disproof of the charge laid in the indictment."

III.

The third point in the Government's supplemental and reply brief is devoted to the question of the "interest" of the United States. We have discussed this question fully in POINT I. of our main brief, pages 20 to 51, to which we refer. We only observe here that the learned Solicitor General in his reply brief admits that there must be some principle of limitation in this statute, and that it does not embrace everything that may come before any of the departments, and he expresses his inability to define what the limitation is.

We submit that in view of the legislative history of the statute, and the use of the word "interest," which

had a settled meaning, and the canon of construction that criminal statutes must be construed strictly, and *strict in proportion to the severity of the punishment*, it must, we submit, be held that the statute applies only to cases where the United States has a property or pecuniary interest, or will gain or lose something by the decision of the particular matter which is before the department.

It is not necessary in this case to lay down any universal rule. Unless it can be held that the subject matter of the defendant's five visits to the department in relation to the Dennis indictment, the bogus inspectors Bowman and Shove, the McGowan matter, and the books of the Brooks Brokerage Company—unless it can be held that these are matters in which the United States was "interested," it can not be pretended that Section 1782 would apply; but if it would apply *prima facie* and generally to visits to a department, it is enough for this case to say that the subject matter of the five visits of Senator Burton had not the slightest reference to any fraud order, *the only charge alleged in the indictment.*

It will be observed that the learned Solicitor General in his brief admits that the words "*in which the United States is a party or directly or indirectly* INTERESTED" *necessarily make a limitation* and confine the operation of the statute to the matters thus limited; *but he is unable to point out any line of demarcation* between these matters in which the United States is "directly or indirectly interested" and those in which the United States is not "directly or indirectly interested." We have stated in our main brief, and we repeat it here, that according to well settled law which was in force when this statute was enacted, and which was known

to the Judiciary Committee of which Judge TRUMBULL, who reported the statute, was chairman, and according to the numerous cases decided by the courts, referred to on our main brief, the line and only line of demarcation which can be drawn is between those matters in which the United States has a pecuniary or property interest and those in which the United States has not such an interest. Any other view effaces the words " in which the United States is directly or indirectly interested " and leaves the statute without limitation. Furthermore, *there is no practicable way in which the courts can administer this statute except by holding that it means a pecuniary or property interest.*

In addition to all this, this is a criminal statute and must be strictly construed, for the reason so emphatically, justly and forcibly stated by this Court in *United States vs. Brewer*, 139 U. S., 288, where this Court said :

" Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

United States Not a " Party."

As was pointed out on the oral argument of this case, the statute designedly uses THE WORD " PARTY " to apply to the enumerated matters, namely, proceeding, contract, claim, controversy, charge, accusation and arrest; and the United States is a party to all courts martial, and is frequently if not always a party before any civil, military or naval commission.

To any inquiry in reference to a fraud order the United States is not a party within the meaning of

Section 1782. The function of the Post-office Department is to *decide* the matter. While this is an administrative function, it is quasi-judicial in its nature.

The meaning of the word "party" as used in Section 1782 is satisfied by confining its application to cases in which under common usage the word party is employed, and it is neither necessary nor proper in this criminal statute, which must be strictly construed, to give the word party an unusual meaning. The true nature of an inquiry as to whether a fraud order shall be issued is that it is an administrative inquiry, and to apply to the United States in such an inquiry the word "party" is contrary to the accepted and universally understood meaning of that word.

IV.

Section 731 of the Revised Statutes does not Confer Jurisdiction on the Court Below.

The words in Section 731 are "Judicial Circuit" and not "Judicial District." As we stated in the oral argument, we took pains to examine the enrolled copy of the Revised Statutes of 1878, and procured an exemplification of said Section 731, which was exhibited in court. This enrolled act, of which the Court must take judicial notice, contains in the first clause of Section 731, the words "Judicial Circuit" and not "Judicial District," and it is not a misprint in the Revised Statutes nor a clerical error, but is what Con-

gress enacted, and the enrolled act is conclusive, as held by this Court in *Field vs. Clark*, 143 U. S., 649.

We therefore insist that as Congress struck out the word "District," and put in the word "Circuit," this Court cannot strike out the word "Circuit" and restore the word "District."

But even if the word is to be rendered "District" and not "Circuit," that does not help the matter for the prosecution, because as shown in our supplemental brief on the question of jurisdiction under Section 731, the words "Judicial District" were used throughout Title XIII., "The Judiciary," without exception, as *meaning the Judicial Districts which that Title had expressly defined*, and those were only judicial districts in the States, as such districts had been known continuously from the organization of the judiciary in 1789 down to the present time, and not in the District of Columbia or in the Territories.

Justice PECKHAM correctly understood our point, as appeared from the inquiry addressed during the argument, to wit: that the words "Judicial Circuit" and "Judicial District" mean Judicial Circuit and Judicial District in the States and *not in the Territories or in the District of Columbia* and that when the District of Columbia or the Territories are referred to in Title XIII. of the Revised Statutes, they are always specifically referred to by that name and are never referred to as "Judicial Districts" or "Judicial Circuits."

Section 731 is printed under Title XIII., Chapter 12, "Provisions Common to More Than One Court or Judge." This whole Title XIII. deals with the *United States Courts* properly so-called, that is, the District Courts, Circuit Courts, and the Supreme Court; and when Chapter 12 deals with "Provisions

Common to More Than One Court or Judge," it *refers to these United States Courts* and the Judges sitting therein, unless it is otherwise expressly mentioned. This Title XIII. nowhere undertakes to deal generally with the District of Columbia or with the Territories, or with the courts in the District of Columbia or with the courts in the Territories. *Wherever any provision in this Title XIII. is intended to apply to the District of Columbia, the District of Columbia is mentioned by name;* and where it is intended to apply to the territories, the territories are mentioned by that name. Therefore, the words "Judical Circuit" and "Judicial District" as used in Section 731, as well as elsewhere in Title XIII., have and *can have but one meaning, namely, the Judicial Circuits and the Judicial Districts established and defined in Title XIII.*

The learned Solicitor General calls attention to the fact that Section 731 is printed not under Chapter 5, but under Chapter 12, of Title XIII. This is correct, but the suggestion is unimportant, for *the entire Title XIII. deals with the United States Courts and not with Courts in the District of Columbia or Courts in the Territories.*

The matter is in a brief compass. To sustain the jurisdiction of the Court below, it must appear that the *whole* offense was committed in the Eastern District of Missouri. This is impossible, for the indictment alleges that all the services were rendered in Washington, in the District of Columbia; and if this were not so in the indictment, the indictment would be bad for not alleging the *place* where the services were rendered. See on this point *United States vs. Burr* (our main brief, p. 168), in which Chief Justice MARSHALL says:

"The place in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court."

The Government did not attempt to prove any prohibited services of Senator Burton except before the Department at Washington.

No Agreement to Perform Prohibited Services Was Alleged in the Indictment or Proved on the Trial.

As a suggestion to help out the utter failure of the prosecution to prove that any prohibited *services* were performed, something was said during the course of the argument, that the statute prohibits an *agreement* to perform services for compensation, as well as prohibits services themselves. This is true, but in the present case no agreement to perform services is alleged in the indictment, no agreement to perform services was proved by the testimony of any of the witnesses, and there is absolutely no ground for stating that there was any agreement made to perform services before the Post-office Department in the matter of a fraud order, and of course there was no proof that any such agreement was made in the Eastern District of Missouri. As was pointed out on the argument, this is not an indictment on an agreement to render services, but is expressly an indictment for rendering alleged prohibited services for compensation.

Something was said in the course of the argument before this Court, either by the Solicitor-General or by some member of the Court, suggesting whether the

payment in cash in St. Louis on March 26, 1903, might be regarded as a payment *under an agreement* to perform services, and therefore that the jurisdiction of the Court would hold. A complete answer to any such suggestion is that there is no allegation in the indictment that there was any agreement to perform services to prevent the issuance of a fraud order, no agreement to perform services to prevent the issuance of a fraud order was proved, and of course no agreement of that kind was made in the Eastern District of Missouri. No such agreement could have been made on March 26, 1903, when the cash payment was received, for whatever services were performed had already been performed, and there was no agreement then made to perform services in the future. So that it stands beyond question on the indictment and on the proof in this case, that there was absolutely no agreement made in the Eastern District of Missouri, or anywhere else for that matter, to perform services before the Post Office Department to prevent the issuance of a fraud order. Neither the performance of services nor any agreement to perform services took place in the Eastern District of Missouri; the only thing that took place in the Eastern District of Missouri was the cash payment of March 26, 1903, at which date Senator Burton's employment as counsel, terminated.

Section 731 can only apply to cases where the crime was begun in one "district" and completed in another "district." In no other case does it apply; and therefore it can have no application if one of the districts is not a "judicial district" within the meaning of Section

731. *It is not enough that the place where the trial is attempted to be had is one of these judicial districts; both the place where the offense is alleged to be begun* **and** *where it is alleged to be completed must be judicial districts* within the meaning of the statute, or else the statute has no application, for the statute says that in the cases for which it provides, the trial may be had "in *either* district." Moreover, this, if it attempted to make a crime committed in a *State* triable in a Territory or in the District of Columbia, would render the Section 731 so construed unconstitutional (see our Supplemental Brief already filed, pp. 9, 10).

The learned Solicitor-General refers on his supplemental brief (pp. 44, 45), to the Act of February, 21, 1871, and to the Act of March 3, 1901, which provide in substance that the constitution and all general laws of the United States which are *not locally inapplicable* shall have the same force and effect within the District of Columbia as elsewhere within the United States.

There is nothing in the said Act of February 21, 1871, or in the said Act of March 3, 1901, to solve the inquiry which arises on Section 731 of the Revised Statutes. The very question which arises on Section 731 is what the words "judicial circuit" or "judicial district" mean. In the solution of this question said Acts of 1871 and 1901 furnish no aid. The first question is what these words in Section 731 mean, *and then, and not until then,* the question would arise under said Acts of 1871 and 1901, whether this Section 731 is a "*general law*"—and we say it is not, but refers only to "judicial circuits" or "judicial districts," *as*

defined in "Title XIII., The Judiciary"—and this Section 731 (using "judicial circuits" or "judicial district" in this defined and well-known meaning) is by *these very* terms, "locally inapplicable" (words used in Acts of 1871 and 1901 cited by Solicitor General) to the District of Columbia.

As to Section 61 of the District of Columbia Code, cited by the Solicitor General, it is enough to say that that does not deal, or undertake to deal, with place where a crime committed partly in one place and partly in another may be tried.

The question, therefore, remains as to what is meant in Section 731 by "Judicial Circuit" or "Judicial District," and none of the statutes cited by the Solicitor General helps in the solution of that question.

The Solicitor General states (p. 45):

"It [The District of Columbia] is a judicial district."

The District of Columbia may be *a* judicial district, but the question under Section 731 is whether the District of Columbia is a judicial district *within the meaning of that section.* It may be a judicial district for some purposes, to wit, the purposes of holding courts of the District and for other *purposes provided in the District of Columbia Act;* but the question under Section 731, which is part of Title XIII., of "The Judiciary," is whether Section 731 is a judicial circuit or judicial district, *within the meaning of that title.* We say that it clearly is not. The reasons are fully stated on our supplemental brief heretofore filed, and to which we now refer the Court for a fuller discussion of the point.

Construction of District of Columbia Statutes as Contended for by the Solicitor-General Would Make the Statutes Unconstitutional.

Furthermore, if the statutes cited by the Solicitor-General were to be construed as attempting to make the words "Judicial Circuit" or "Judicial District" include the District of Columbia, such statutes would to that extent violate the Constitution of the United States, Article 3, Section 2, and the Sixth Amendment, as shown in our Supplemental Brief already filed, pp. 9, 10.

It would be no answer to this proper construction of Section 731 that it might permit certain offenses committed partly in a territory or in the District of Columbia and partly in a State to go unpunished. That would be nothing more than would occur at the common law and if there were no statute at all.

Furthermore, it is a well settled principle that every statute amending the common law must look out for itself; and especially is this true of a criminal statute, and no cases will fall within the statute except such as the legislative body have expressly put there.

The remedy, if any remedy is desired, is by an appeal to the legislative body to enact proper legislation; the courts can not supply the want of it. If Congress thinks the situation calls for additional legislation, such legislation can be had, and Congress can so define a crime that whether it is begun in the District of Columbia or in a territory and completed in a State,

or the reverse, the proper punishment may be had. Such would be the proper course rather than to stretch the statute to mean something that evidently it was not intended to mean and does not mean.

V.

The Court below had no jurisdiction as respects the indictments based on the four checks.

The discussion of this subject in our main brief under Point II. is full, and we are satisfied with, and refer the Court to it without repeating or undertaking to repeat or restate the arguments here.

The Solicitor General places the jurisdiction as respects the checks wholly upon what he calls a "custom" stated in the testimony of Mr. Brice, cashier of the Riggs Bank, as follows (Record, pages 106, 107) :

"Q. Go on and state the course of dealing with that check, and others of that kind. A. The usual custom of the bank, as I stated, is to deposit the check to the credit of the depositor ; send it forward direct either to the place where it is drawn for collection, or else to some convenient collection agency near the place where the check is drawn. If the check is not paid, it is returned to the bank in the usual course, going to the bank where it is first sent, and then it takes one of two courses : that check is held in the bank teller's possession until the depositor calls and takes it up, or else charged against his account as if it were a check drawn against his account, and is surrendered to him on settlement of his account, together with other checks or vouchers which he may have drawn, the depositor being duly notified of such non-payment.

"Q. Was there with the Riggs National Bank any

agreement made with Senator Burton contrary to the course you have just indicated as occurring? A. I know of no such special agreement."

Mr. Brice was merely testifying to a practice universal among banks everywhere, and he did not profess to state any "custom" peculiar to Washington. Moreover, he expressly stated (p.107) that there was no special agreement made with Senator Burton in respect of the deposit of these checks and receiving credit therefor.

In the present case, the course taken by the Riggs Bank was exactly the course ordinarily taken by a bank where a deposit is made and an immediate credit given.

On the oral argument, it was suggested by one of the Justices that some banks put in their pass-books a notice to the depositor that all items are taken for collection unless otherwise stated. There is no proof in the present case and no pretense that any such notice existed on the pass-book of Senator Burton in the Riggs National Bank. The very fact that such a statement is printed on the pass-book of a bank shows that without such a statement the ordinary rule of law applies —namely, that when a bank takes a negotiable instrument under an endorsement and transfer of title and credits the depositor, the bank becomes debtor and the depositor becomes creditor of the bank, and the instrument is not taken for collection.

The language of Brice, the cashier of the Riggs Bank, referring to the forwarding of checks "for collection," with the understood right to charge it back if not paid, shows no custom contrary to the legal effect of the transaction. His words were general words, and the legal effect of what was done—namely, the endorsement and transfer of the title of the check and the

crediting of the check on the pass-book—cannot be controlled by general words that the custom of the bank was to *forward* checks for collection. Observe that what the cashier states is *not that the bank took the checks for collection*, but that the bank *forwarded them for collection*, which is a very different matter; for, whether the bank acquired the title to the checks, as we maintain, or whether it took the checks for collections, as the Government maintains, the bank would in either event forward the checks for collection, or deposit them in other banks. *There was no custom of taking a check for collection*, and Brice, the cashier of the Riggs Bank, does not testify that there is a "custom" of taking a check for collection.

But Even if the Riggs National Bank had Taken the Checks for Collection (Which We Deny), yet the Subsequent Endorsees of the Checks, if They Were Agents at all (Which We Deny), Were the Agents of the Riggs National Bank and Were not the Agents of Burton; and Therefore Burton was not Present in St. Louis When These Checks Were Paid, and They Were not Paid to Him.

We discuss this point in our main brief (page 148), citing the decisions of this Court which are conclusive on that point; to which point we notice the Solicitor General makes no reply.

VI.

"One good Count" theory of Solicitor General.

Finally, the Solicitor General says that if the Court had no jurisdiction as respects the checks, it had jurisdiction as respects the payment in cash on March 26, 1903, and that if one Count in the indictment is good that is sufficient.

To this there are two answers:

The first one is made in Point IV. of our main brief (page 174), namely, that this was not the payment for any services rendered by Senator Burton before the Post-Office Department.

The other answer is that if the Court had no jurisdiction as respects the four offenses represented by the checks in counts six, seven, eight and nine, the judgment must be reversed for the reasons specifically set forth in our main brief, pages 171–173.

The facts shown in the Record, as they are referred to in our main brief on said pages 171–173, show that the principle relied on by the Solicitor General, that if one count is good it is sufficient, can have no possible application to this case.

The learned Solicitor-General states in his supplemental and reply brief that cash was paid to Senator Burton in person at St. Louis, referring to the payment of March 26, 1903, and cites certain cases in this Court to the point that one good count will sustain a judgment of conviction. Stated in this bald fashion, this proposition is not true. The correct statement is that which is made by Mr. Justice GRAY in the case of *Claassen vs. United States*, 142 U. S., 146:

"And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because *in the absence of anything in the record to show the contrary*, the presumption of law is that the court awarded sentence on the good count only."

So far from the learned Solicitor-General's statement being true, there are two cases cited by him in this Court, *Ballew vs. United States*, 160 U. S., 187, and *Putnam vs. United States*, 162 U. S., 687, in each of which this Court held the judgment below *good on certain counts*, and *reverses the judgment as to other counts*. Mr. Justice GRAY, Mr. Justice BROWN and Mr. Justice SHIRAS, in their concurring opinion in *Selvester vs. United States*, 170 U. S., 262, 271, state the decision in these two cases as follows:

"In *Ballew v. United States*, 160 U. S., 187, 203, and in *Putnam v. United States*, 162 U. S., 687, 715, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count," etc., etc.

The principle stated by the learned Solicitor General applies where this Court on writ of error is examining an indictment to see *whether or not on the face of the indictment* and on the face of the verdict and judgment the indictment is good. *But where there are exceptions to the rulings of the Court in the progress of the case either on the admission of evidence or in instructions to the jury, if these rulings are erroneous this Court on writ of error has a right and it is its duty to reverse the judgment of the lower Court.* And as to such rulings, the principle that where one count is good the judgment must stand, has absolutely no application.

In the case, for example, of *Claassen vs. United States*, 142 U. S., 140, above cited, the question arose only on the indictment. Mr. Justice GRAY said (page 147):

"In the case now before us, the record does not show that any instructions at the trial were excepted to, and the jury did not return a general verdict against the defendant on all the counts, but found him guilty of the offences charged in each of the five counts now in question. This being the case, and the sentence being to imprisonment for not less than five years nor more than ten, which was the only sentence authorized for a single offence under the statute on which the defendant was indicted, there is no reason why that sentence should not be applied to any one of the counts which was good.

"The objections assigned and argued to the rulings and instructions at the trial cannot be considered by this court. Upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record. The case settled by the judge presiding at the trial, pursuant to a rule of the Circuit Court, was for the single purpose of a hearing in banc in that court, as upon a motion for a new trial, and is no part of the record on error. No bill of exceptions was, or, as we have already adjudged, could have been allowed by the Circuit Court to the rulings and instructions at the trial, because the conviction of the defendant was before the passage of the Judiciary Act of March 3, 1891, c. 517, and while the laws did not provide for or permit a bill of exceptions in such a case as this. Neither the assignment of errors nor the plea of *in nullo est erratum*, can give this court jurisdiction of errors not appearing on the face of the record. *In re Claassen*, 140 U. S., 200. Judgment affirmed."

The only errors, therefore, which could be noticed in the case of *Claassen vs. United States* were errors appearing on the face of the common law record, not errors in any bill of exceptions, for there was no bill of exceptions.

So, also, the case of *Evans vs. United States*, 153 U.

S., 584, involved merely the *sufficiency of an indictment on its face*, and did not involve erroneous rulings of the Court in the progress of the trial.

Moreover, and conclusively, the principle that where one count is good the appellate court will, if there is nothing to the contrary in the record, affirm the judgment as to such good count, has no application in this case, because this record shows affirmatively that the judgment and sentence of the Court was rendered upon and included punishment for each of the offenses charged in the Sixth, Seventh, Eighth and Ninth Counts, that is to say, for offenses over which the Court in St. Louis had no jurisdiction. The proceedings in the Court below showing the truth of this statement will be found summarized in our main brief (pages 171, 172, 173).

There is not one good count in the present case. What the Solicitor General means is, clearly, that there was one payment in St. Louis, namely, the payment in cash on March 26, 1903. That, however, does not make a good count. In order to constitute an offense under the statute there must be *services or an agreement to render services as well as payment therefor*, and the mere fact that there was this cash payment in St. Louis on March 26, 1903, does not in and of itself constitute one good count. As we say in our main brief, page 174, there was an utter failure on the part of the Government to prove the rendition of any services to prevent a fraud order, for which the said payment on March 26, 1903, was compensation. The services as to the checks and the payment by check should have been wholly taken out of the case, and when these were entirely out of the case, it would then have stood before the St. Louis Court simply that Burton at the conclusion of his employment had been paid in cash $500 on March 26,

1903, and there would have been no proof whatsoever of any services rendered therefor to prevent the issuance of a fraud order. It is therefore utterly impossible for the Solicitor General to state that there was one good count. There is not one good count, on any theory, unless it is the false theory repeated by the trial Court at least five times in the course of the trial that "compensation is the gist of the offence," and that, therefore, applying this principle, if the jury found that the defendant received $500 he was guilty irrespective of whether it was pay for the rendering of any other services or not.

It is an unsound proposition and probably misled the court throughout the trial, **that compensation is the gist of the offense.**

The offense consists of two parts. *First*, the rendering of services prohibited by Section 1782, and as alleged in the indictment. *Second*, the receipt of payment therefor. And it can no more be predicated of compensation that it is the gist of the offense, than it can be predicated of the services that they are the gist of the offense. The truth is that neither is the gist, but that both are essential to the completion of the offense.

VII.

Errors in the Additional Charge.

We maintain as long as this additional charge stands in the record that it must inevitably result in a reversal of the judgment below. We have discussed

this matter very fully in POINT VII. of our main brief (page 215 *et seq.*), to which we refer without here restating the grounds of the argument. The Solicitor General attempts to sustain this additional charge by reference to certain instructions which the *defendant* asked before the jury retired the first time, and which are found on the record (pp. 242–244).

We make the following observations.

These instructions stood discredited from the first by the following statement of the Court, page 242:

"THE COURT: I have been asked by counsel for defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you.

These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law."

It is not true, as stated by the Court, that the declarations of law were, in the main, covered by the charge. It is not true that they were abstract propositions of law, more fully amplifying the charge. On the contrary, the original charge contained vague, abstract and general propositions, whereas the instructions asked, and which were discredited and emasculated by the observations of the Court above quoted, were pertinent, specific and sound. Your Honors' experience will enable you to realize without any comments from counsel how little weight, if any, these propositions would have, thus discredited from the bench.

We respectfully but earnestly ask the Court to examine the instructions which the defendant thus asked

(Rec. pp. 242–244), and see for themselves that it is not true that they laid down abstract propositions of law, but that the propositions stated were concrete, pertinent, applicable to the case, and directed the jury to the points on which the question of guilty or not guilty should turn.

We also ask the Court to examine the said instructions asked by the defendant in order to see that the statement of the trial Court that they had been in the main covered by the charge is a mistaken statement, and that the original charge did not direct the attention of the jury to the essential points which were included in these instructions asked by the defendant, and therefore the Court did the defendant a great injustice in characterizing these instructions as abstract and general and in stating that they had been covered by the Court's charge.

The instructions asked by the defendant were right or wrong. They ought to have been given without any discrediting qualification, or they ought to have been refused; so that the defendant could have the full benefit of the instructions if correct, and the full benefit of an exception if they were correct and were refused.

The error committed by the Court in thus discrediting and emasculating the instructions would be bad enough in a civil case, but in a criminal case, where the reputation and liberty of a citizen are at stake, such an error ought not to be tolerated. No one can measure its effect upon the jury. *This error the Court persisted in and refused to correct.* (See, specially, Record, page 252).

A further observation is, that if it was proper to give those instructions, then the Court ought to have taken

the case from the jury, because they covered the whole ground of alleged guilt. That these instructions asked by the defendant had no effect on the jury is evident from their communication to the Court when they returned on the following Monday (Record, p. 246). The juror's inquiry related to such services as Burton *did render before the Post-office Department in the five visits*, and the Court's answer shows that it entirely mistook the juror's inquiry. The juror had in mind the lawful and proper visits of the Senator to the department having no reference to a fraud order, but the Court assumes that the services rendered in those five visits were criminal and left only to the jury the question whether he received pay for what he did in those five visits, saying as follows (Record, p. 249):

"In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the department to render services does not excuse him provided he receives compensation for those services. I think this will make it clear so far as the first part of the inquiry is concerned, that *in order to excuse* the Senator from *anything he did before the department in rendering services* you must find he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services. *If he received compensation for those services he is guilty under the law.*"

This fatal charge assumed that the visits and services were prohibited and were of the character charged in the indictment, and the assumption is not true.

So the Court equally mistook the second question put by the juror. The Court said (Record, p. 250):

"You can see plainly that the bare fact that service was rendered before the department in the way charged in the indictment might be the very reason why there

would have been in this case the report that there was nothing in the thing which was being investigated."

This mistakes the *facts* in the case, as will appear by the chronology which we give in our main brief, at pages 227, 228.

Then the Court proceeds (Rec., 250) :

" The very thing which is before the jury to be considered is whether there was *anything* pending."

This is not the very thing. The very thing is, did the defendant render services to prevent the issuance of a fraud order with knowledge that the Evans and Hout charge was pending, and seek to get a favorable decision.

It is perfectly obvious that it was this additional charge that brought about the conviction. It practically cancelled everything that took place before. The Court refused to call attention or to allow counsel to call attention to the defendant's requests, which it had discredited and emasculated as above stated, when they were asked (Rec., 252). And to force the concurrence of the jury in a verdict of guilty, the Court said (p. 251) :

" Counsel for the *defense* in case of a conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject."

We are here to have this promise redeemed. From one end of this additional charge to the other there is *no reference whatever to a fraud order or services to prevent the issuance of a fraud order,* and no statement by the Court that the defendant could be convicted only in case he rendered services to prevent the issuance of a fraud order.

On the contrary, the jury were expressly instructed

that if he performed the services which he did perform in those five visits, he was guilty, if he got paid for them.

The learned Solicitor General, in his supplemental and reply brief, refers to various parts of the original instructions of the Court, which he claims confined the inquiry of the jury to services to prevent the issuance of a fraud order. But the learned Solicitor General fails to take account of the fact that this additional charge of the Court had the effect of *canceling any such prior instructions.* And, moreover, as we have shown in the original brief, the learned Solicitor General is wholly mistaken in supposing that the Court, even in its original charge, confined the inquiry to services to procure a fraud order. On the contrary, as we have shown in our main brief, pages 229, 230, 231, 232 and 233, the Court's original charge, taken as a whole, did not so confine the attention of the jury to services in relation to a fraud order. Even if it were to be construed as doing so in the original charge or the discredited instructions which it gave, the effect of this was wholly nullified and canceled by the additional charge and the circumstances attending it.

We respectfully refer the Court to our main brief, POINT VII. (pp. 215–238), for fuller statement of this matter of the Court's error in its charge and additional charge to the jury.

VIII.

Concluding Observations.

The original brief, as well as the supplemental and reply brief of the learned Solicitor-General, contain

certain innuendos, insinuations, suspicions, epithets and mistakes of fact.

Lest absolute and entire silence with respect to these might be construed into an admission of their correctness or justice, we will briefly refer to some of them with slight comments.

On page 18 of the Solicitor-General's main brief occurs this language :

" McGowan was an Indian agent who had evidently been swindled by the Rialto Company and was threatening."

There is not a line or word in the record to justify this statement, that McGowan " had evidently been *swindled* by the Rialto Company." On the contrary, what little evidence there is bearing on this wholly immaterial matter goes to show that McGowan was trying to use his official position to blackmail the company.

In the main brief, page 20, the statement is made that the Rialto Company was the Brooks Company in another form.

The evidence plainly contradicts this. The Rialto Company was organized under the legal advice and direction of Judge Krum and Mr. Harlan on an entirely independent basis (see Record, pages 167, 169, 183).

On page 21 of the Government's main brief the Solicitor-General says :

" Burton, before he was senator of the United States, *if not afterwards,* had represented a certain Weltmer before the Post Office Department in a fraud order proceeding."

There is not one syllable of evidence in the record to support the insinuation that Senator Burton represented Weltmer before the Post Office Department after he was Senator, or that Weltmer ever had any matter before the Post Office Department after Burton was Senator, nor is such statement true in fact.

On page 22 of the main brief the Solicitor General says:

"Burton was to be paid $2,500, and, in fact, he received that sum in five monthly installments of $500 each, the termination of the arrangement being broached by Mahaney, the secretary of the company, immediately after Congress adjourned in March, 1903."

Two wrong impressions are conveyed in this statement: *First*, that the contract was to be for an entire stipulated amount, whereas the fact is that the contract was for $500 per month (see our Main Brief, p. 174 *et seq.*, where this is fully shown, and the fact is further shown that in any view Senator Burton performed no services before the Department for his "month's pay" of $500 handed him in cash in St. Louis, March, 26, 1903); and, *Second*, that Burton, and not Mahaney, terminated the employment is proven not only by Burton's statement, but even MacRae said that Mahaney told him that Burton had resigned, and Harlan said that Mahaney told him that Burton had terminated the contract (see Record, pages 162, 189, 224).

Again, on page 29 of the main brief, is this statement:

"But it is evident, from Harlan's cross-examination, that Mahaney was not mistaken, because, while Harlan insisted that the reason given by Mahaney was not given at the conference on December 24, he admitted that, at his next conference with Krum, the latter suggested that probably Burton had better not

appear, because that might detract from his influence at Washington, and Harlan disagreed with that view."

The foregoing is a most glaring mistake. The learned District Attorney put the substance of the foregoing in the form of a question to Mr. Harlan, and his answer was "No, sir" (see page 186 of the Record).

This question relates to what Harlan testified to before the Grand Jury. Harlan, some time after the indictment against Burton, was called before the Grand Jury for the purpose, as counsel says, of pumping him.

Respecting the reason why Senator Burton did not appear before trial after having gone over the case most carefully with his client first at Washington and then with his associate counsel later at St. Louis, Mahaney testified willfully false, or else Judge Krum, Mr. Harlan and Senator Burton testified willfully false (Krum's testimony, Record, pp. 227, 228; Harlan's testimony, p. 177; Burton's testimony, p. 224). There is no room to harmonize these contradictions. All three of them contradict Mahaney and discredit his testimony.

In the reply brief (page 18) occurs this language:

"Since these books were part of the Rialto Company's plant in their illegitimate business, and as they appear to have embraced records or lists of addresses in that business all over the country, they might have been a very material aid to the government inquiry on the fraud order."

The Solicitor General is bold in continuing to call the Rialto Company's business illegitimate, but he is bolder still when he attempts to say what these books and records were of the Brooks Brokerage Company, for the record is entirely silent on that proposition.

Again on the same page (18) occurs this language :

" The case against Dennis out of the Brooks Company business in the federal court, it is true, was over, but federal indictments were pending against MacRae, Garland and Dennis, growing out of the business of the Rialto Company " (page 197).

Referring to the record, it will be seen that the trial Court excluded all evidence as to whether indictments had been found against the above named parties, or when these were found. This statement of the Solicitor General is not supported by the record. If we were to say that indictments against these parties were found in the month of December, 1903, many months after Senator Burton's contract of employment had terminated, that Dennis, from the time of said indictment, was continuously in St. Louis up to the middle of the following April, when he died, was never apprehended or arrested, although he was frequently in the presence of the officers of the Federal Court, and that he never heard of any indictment against him in the Federal Court by reason of his connection with the Rialto Company until at the time of the trial of this case; and further, that Mahaney and MacRae were indicted in order that they might testify in this case with a rope around their necks, and that they have never been brought to trial down to this date, all this would be strictly true.

On page 19 of the reply brief occurs this expression :

" All of the ways in which Senator Burton kept the department in good humor with Dennis doubtless do not appear in this record."

That this statement has nothing but suspicion for a foundation will readily appear when it is remembered

that during the entire time Senator Burton was attorney for the company he never heard that the company had any trouble with the department; he never heard of any complaints except the first two, and there was nothing to keep the department in a good humor with Dennis excepting to try to prevent friction because of the action of Mr. Dice respecting the books.

The Solicitor General, all through his brief, in his discussion of the facts, seems to give the impression that the Post Office Department is complaining against Senator Burton because he used his influence in preventing that department from doing its duty. How absurd when the facts are remembered.

The Rialto Company was organized on September 2, 1902, and during its entire existence had its offices under the shadow of the Postal Department as represented by Inspector Dice.

On November 14 the Hout and Evans complaints were examined by an inspector and reported nothing in them (Rec., pp. 70, 202). And then in July and August following, after a full examination of the company, it continued to run, and Mr. Dice thought it was in existence and doing business at the time of the trial of this case in March, 1904, wherein he testifies:

"Q. When did the company go out of business? A. The Rialto Grain & Securities Company?

"Q. Yes? A. I do not know that it is out of business.

"Q. Has not it been out of business for a good many months? A. I do not understand so."

Record, pages 72, 73.

Now, when no recommendation for a fraud order was ever made against this company, and no fraud order was ever issued against this company, is it not unjust for counsel to contend that this was because of any-

thing that Senator Burton ever did. And does it not conclusively show, further, that the Post-office Department was guilty of great negligence to say the least, or that it was satisfied that the Rialto Company had done nothing for which a fraud order ought to issue against it.

This matter of the breaking up of the Rialto Company, which is all in the mind of the Honorable Solicitor-General, and not in the record, is referred to on his main brief, page 35, as follows:

"During the following summer the investigation upon the additional complaints which had come in against the Rialto Company was pursued vigorously and thoroughly, and this, in connection with the state's activity, resulted in thoroughly breaking up the company."

There is not a line or sentence in the entire record with reference to anything that the State did do or did not do against the Rialto Company, and that the Solicitor-General is mistaken about the breaking up of the company is conclusively proven by his own witness, Inspector Dice, to which we have referred above.

Counsel tries to make something of the destruction of two letters that both Harlan and Burton state had absolutely nothing to do with the case, but were of a personal nature. In this connection it seems the Solicitor General forgets that every letter in this record, both those written by Burton to Harlan and those written by Harlan to Burton, except the one of February 11th, were in the hands of Senator Burton for a period of 24 hours after he was indicted, and were in the hands of his attorney, Judge Krum, and were by his (Burton's) knowledge and consent turned over to Col. Dyer, U. S. District Attorney at the time that he was

examining or rather, pumping Harlan before the Grand Jury, and that there would be no letters in this record except for the voluntary action of the defendant, with the single exception of the letter of February 11th.

Immediately upon Senator Burton's indictment he proceeded to St. Louis at the earliest possible moment, and not only voluntarily turned over all letters, with the exception of the letter of February 11 (which was not in his possession), which were afterwards introduced against him by the Government, but he also went upon the stand and testified fully and freely as to all his connection with the Rialto Grain and Securities Company, and as respects all the several interviews with Cochran, the chief inspector, and the Government's main witness. He did not conceal anything or attempt to conceal anything in all this trial. He was not contradicted in any point or matter by Cochran, and not in any material matter by even Mahaney or MacRae or any one else. The insinuation on the part of the Solicitor General that Senator Burton concealed anything or undertook to conceal anything is wholly gratuitous and is not supported in any respect, except by the discredited witness, Mahaney, in matters having no reference, however, to a fraud order. Mahaney and McRae were indicted and testified on this trial as witnesses for the Government, and neither of them has ever been brought to trial by the Government, and hence we felt justified in saying above that they testified with a rope around their neck.

On page 16 of the reply brief, this statement is found:

"In Burton's reply of December 9th [page 136], in saying that no instructions whatever about the Rialto

Company have gone out from the Department, he manifestly means that a fraud order had not been issued."

What a strange construction is this? A fraud order by its very nature and operation is public, and the very first persons to know of its issue are the Post Master at St. Louis and the Rialto Company whose mail is stopped. And further, Cochran says that there, was never any talk with him by Burton about a fraud order; not a word at any time passed between them on that subject. If Burton had talked or communicated in any way with any other departmental official, it would not have escaped the vigilance of the Government, and the zeal which has characterized this prosecution against Senator Burton we may be sure would have placed that official on the witness stand along side of the several officials of the Post-Office Department on both sides of the Alleghenies who did testify for the Government. The prosecution moved heaven and earth to secure a conviction, and it is perfectly certain that if any official of the Post Official Department other than the witnesses produced on the trial had been visited or spoken to by Burton they would have been taken to St. Louis to testify.

On page 15 of the supplemental and reply brief is the following statement:

"Mr. Price does not seem to have been a very vigilant or thorough inspector."

It is no part of the duty of counsel for Senator Burton to defend Mr. Price or the post-office officials either in Washington or St. Louis. Apparently, however, this and other insinuations of the Government's

counsel against the post-office inspectors has no more foundation than the like insinuations against Senator Burton. What justification is there for the statement that Price was not a vigilant or thorough inspector? The record shows that on the 7th of November the Hout and Evans complaints were sent out from Washington to St. Louis. They reached Dice on the 10th of November. They were promptly handed to Price for investigation. They were promptly investigated and a report made November 14 that there was nothing in the complaints. No complaints other than the Hout and Evans were ever filed. The letters of Fravel, Allen and Warner were not complaints at all. Dice's zeal for the Government is manifest throughout this case.

The important thing to be here observed is that, so far as the complaints against the Rialto Company were concerned, they had all been remitted under the rules and regulations of the Department from Washington to St. Louis. Burton, although several times in St. Louis during the time of his employment, never saw Dice or Price or any official of the Post-office Department, and it is not pretended that he did. The matter having been referred from Washington to St. Louis for investigation, and all the papers sent to St. Louis, there was nothing in the department at Washington or any data for an investigation, and it appears by the undisputed testimony of Cochran and Burton that the matter of any complaints against the Rialto Company or the issue of a fraud order was never discussed, never spoken of or in any manner mentioned between Burton and Cochran or any other official of the Post-office Department.

Yet, in view of these undisputed facts, we meet with

the following extraordinary, wholly unjust and most unfounded statement of the learned Solicitor-General in his supplemental and reply brief (page 41):

"Burton's traces were well covered. His assertions on behalf of himself and his client make a fair outside, but he held up the investigation because he was Senator and not only because he was General Counsel of the Rialto Company, and the force of the Judge's charge animadverted on at the bar were perfectly accurate and just. If not, the most dangerous evil in this entire situation—namely, that intangible, subtle and insidious thing, 'influence,' can never be reached even where the receipt of compensation can plainly be shown."

We pronounce as utterly unfounded in this record, that any investigation was "held up" because of Senator Burton's employment by the Rialto Company, or even held up at all. The learned Solicitor-General does not seem to realize that in making such a statement he is villifying the post office officials. Who are the guilty post office officials? And why does not the Department of Justice busy itself with trying to bring them to justice?

The post office officials have shown no lack of zeal in the prosecution of Senator Burton. They indicted him 1,200 miles away from the place where the alleged services were rendered. They had all the power and force of the Government to take their witnesses from beyond the Alleghenies and other parts of the country to support the charge, leaving Senator Burton with his own unaided resources to get his witnesses at this distant place of trial, if he was able to do so, and to support the burden and costs of his defense. He tried to get the Postmaster-General as a witneas and failed, because St. Louis was too far away from Washington.

If the present insinuations of the Solicitor-General are true, that the investigation was "held up" by the post office officials by reason of Senator Burton's "influence," let the Department of Justice manifest the same zeal with which they have prosecuted Burton and bring them to justice. This brief abounds with charges of swindling and fraud on the part of the Rialto Company and its officers, and the curious result is presented that no "fraud order" has ever been issued against the Rialto Company and no indictment against its officers ever brought to trial. The energy of this prosecution, for some reason inscrutable to us, seems to have been directed with all the zeal, force, power and resources of the Department alone against Senator Burton.

The Court will bear us in mind that in opening this case and in the argument at the bar we refrained from making any observations as respects the nature of this prosecution, and we only make these in answer to the unjust and unwarranted statements in the brief of the learned Solicitor General.

Moreover the learned Solicitor General seems to be unconscious that the statement on page 41 of his brief, that "Mr. Burton's traces were well covered," is practically a confession of the fact that the prosecution has been unable to prove the allegations of the indictment. The Solicitor General's words mean this, if they mean anything of importance.

So likewise his statement (page 41), that

> "If not, the most dangerous evil in this entire situation, viz., that intangible, subtle, and insidious thing, 'influence,' can never be reached even where the receipt of compensation is plainly shown,"

is a confession that the prosecution has been unable to show any "services" and they want the defendant

convicted, not for "services rendered" as alleged in the indictment, but for the exercise of "that intangible, subtle, and insidious thing, influence."

We thus have the most surprising situation that, although Cochran, the only Government witness to prove the charge in the indictment, testifies that from the beginning to the end there was no discussion between him and Senator Burton as to the issuance or non-issuance of a fraud order, the Government wishes to insist on a conviction because of the existence of what the learned Solicitor-General calls "that intangible, subtle and insidious thing, influence," which was supposed to have been exerted in reference to a mythical matter, to wit, the existence of a fraud order inquiry at the time in the Department at Washington.

Of course, a complete answer to this extraordinary position of the Solicitor-General is that the statute prohibits "services" and nothing else, and even if "influence were within the statute," it would still be necessary for the Government in a prosecution to prove the exercise of influence, and on this record it stands uncontradicted that the only Government witness (Cochran), whom Senator Burton visited or saw, denies that the question of the issuance of a fraud order was ever discussed or considered.

Possibly in the light of this extraordinary position of the Solicitor-General, we are able to get a glimpse of the reason why the Solicitor-General states in his brief, and why the learned Judge on the trial below, stated that the receipt of compensation is the gist of the offense; for certainly no services of Senator Burton to prevent the issuance of a fraud order were proved

or could be proved, and, therefore, the only hope of their being able to convict Senator Burton was to regard "influence," not proved but imagined by the prosecution, as within the statute, and, therefore, they stated that if he received compensation he was guilty.

On page 18 of the reply brief the following statement is found:

"It was safer to have the books back in the Rialto Company's possession, and Burton appears to have secured their return by his persistence."

Burton did no such thing. He did not ask even that the books be returned to Major Dennis. He was perfectly willing that the Government should retain their possession. What he did do was to protest against their being turned over to the State authorities after the Government was through with them. Respecting this matter Burton testified as follows (Record, page 222), and there is no contrary testimony:

"I showed him [Cochran] this telegram, and he expressed surprise at that part of it which said 'Col. Dyer told me he had no further use for them,' and said he would look into the matter at once. I told him that I knew nothing about the matter further than he did, but that if Mr. Dice, or Col. Dyer or the Government or anybody connected with the Government wanted to keep these books there was no objection, as far as I knew, and if there was, I would not urge any objection. But, unless he could give me some reason why they should be turned over to the State authorities, it would seem that that was not fair and right."

Doubtless it was because Dice still persisted in keeping possession of the books that Burton used the expression in his letter "I have tried to keep the Depart-

ment in a good humor with Dennis." It could have referred to nothing else, for there was nothing else in the Department to which it could refer.

Moreover, the statement of the learned Solicitor General that "Mr. Burton appears to have secured their return by his persistence" has no foundation in the record. So far as the record shows, the books were never returned by Dice to the Rialto Company or Dennis, and are in Dice's possession still.

On page 20 of the reply brief, the learned Solicitor General says, referring to the two letters Harlan returned to Burton: "What does it ordinarily mean when letters are destroyed?—that the person procuring their destruction is conscious of doing something wrong, * * * a confession that he had done wrong and violated the statute."

This interpretation makes Harlan a perjurer as well as Burton, for they both say the letters did not relate to the Rialto Company in any way.

And there is nothing to contradict their testimony or to make it in the least improbable.

The learned Solicitor General, in his supplemental and reply brief, page 20, referring to the interview in St. Louis on March 26, between Burton and Mahaney, when Burton's employment was terminated, says:

"Burton says himself there is nothing pending in the Department of a serious nature against the company; that the situation there is cleaned up."

In reference to this we have to observe as follows:

1. If any such words were used, it will be seen, by

reference to Mahaney's testimony (page 120) and MacRae's testimony (page 162), that these words were used by Mahaney and not by Burton, and, therefore, the Solicitor General is incorrect when he states, on page 20, that Burton "says himself there is nothing pending in the Department of a serious nature against the Company; that the situation there is cleaned up."

2. If, however, these words are to be regarded as what Mahaney said in Burton's presence, it is to be noted that the Solicitor General is utterly inconsistent in his theories, for he states that there was this matter of a fraud order pending in the Department at Washington, and that Burton knew it, and yet he is insisting that Burton, Mahaney and MacRae are all agreed in the fact that everything is cleaned up; in other words, that there was no fraud-order inquiry pending at Washington.

3. As a matter of fact, there were certain matters in respect of which Senator Burton had visited the Department, namely, the question of the Dennis indictment, which had been cleaned up by the acquittal of Dennis; also the question of whether or not Bowman and Shove were inspectors; also the McGowan matter, and the matter of the books of the Brooks Brokerage Company; and the words "cleaned up," if they were used, applied to these various matters.

Confirmatory of this, we call attention to the following from Mahaney's testimony (Record, page 121):

"COL. DYER: Q. Was there anything said in that conversation about complaints that had been referred to the Post Office Inspectors here for examination? A. I do not think there was. I do not recall."

It is an undisputed and indisputable fact on this record that not a word was written and not a word

spoken by Senator Burton to Cochran or any official of the Department about the complaints of Hout and Evans after Harlan in his letter of November 22 (Record, page 175) wrote Burton that they had been examined by the post-office officials and they had found nothing in these complaints and had made a *report in favor of the Rialto Company in respect of them.*

On this vital and important and in Burton's favor controlling point, Burton and Cochran both concur.

This brief on behalf of Senator Burton is purely in reply to the supplemental reply brief of the United States filed since the argument. This brief of ours is in no sense a substitute for *our main brief* and *our supplemental brief* already filed, to which we beg the Court's careful attention, but is merely to correct certain errors into which the learned Solicitor General has fallen and in reply to some of the new suggestions which he has made.

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